

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH GUILLORY,

Petitioner and Appellant,

vs.

No. 22411 ✓

LAWRENCE E. WILSON, Warden;

LOUIS S. NELSON, Warden;

STATE OF CALIFORNIA, et al.,

Respondents and Appellees.

APPELLEES' BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
Deputy Attorney General

JOYCE F. NEDDE
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-1348

Attorneys for Appellees

MAR 1 1968

FILED

FEB 23 1968

WM. B. LUCK CLERK

TOPICAL INDEX

	<u>Page</u>
JURISDICTION	1
STATEMENT OF THE CASE	
A. <u>Proceedings in the State Courts</u>	1
B. <u>Proceedings in the Federal Courts</u>	2
SUMMARY OF APPELLEES' ARGUMENT	3
ARGUMENT	3
CONCLUSION	5

TABLE OF CASES

<u>Application of Atchley,</u> 169 F.Supp. 313 (N.D. Cal. 1958)	4
<u>Boseant v. Fitzharris,</u> 370 F.2d 105 (9th Cir. 1966)	4
<u>Bowie v. Wilson,</u> 373 F.2d 514 (9th Cir. 1967)	5
<u>Hughes v. Wilson,</u> 365 F.2d 596 (9th Cir. 1966)	4
<u>Rose v. Dickson,</u> 327 F.2d 27 (9th Cir. 1964)	4
<u>Schiers v. People of the State of California,</u> 333 F.2d 173 (9th Cir. 1964)	4
<u>Thomaston v. Gladden,</u> 369 F.2d 693 (9th Cir. 1966)	5

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH GUILLORY,)	
)	
Petitioner and Appellant,)	
)	
vs.)	No. 22411
)	
LAWRENCE E. WILSON, Warden;)	
LOUIS S. NELSON, Warden;)	
STATE OF CALIFORNIA, et al.,)	
)	
Respondents and Appellees.)	
)	

APPELLEES' BRIEF

JURISDICTION

The jurisdiction of the United States District Court for the Northern District of California to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253. Proceedings in forma pauperis were authorized by Title 28, United States Code section 1915.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

On July 9, 1959, appellant was convicted in the Superior Court of Los Angeles County of violating Penal Code section 67 (bribery), was found to have

suffered one prior felony conviction, and was sentenced to imprisonment in state prison for the term prescribed by law (EXHIBIT A). On appeal, the conviction was affirmed on March 16, 1960, by the California Court of Appeal, Second Appellate District, in People v. Guillory, 178 Cal.App.2d 854, 3 Cal.Rptr. 415. A motion to vacate judgment was denied by that court on September 6, 1966.

Applications for writs of habeas corpus were filed in the Superior Court of Marin County: No. 46385 (denied August 25, 1966); California Court of Appeal: No. 1/Crim. 5031 (denied March 30, 1965), No. 1/Crim. 5906 (denied September 16, 1966); and California Supreme Court: No. 10382 (denied October 14, 1966), No. 11595 (denied November 8, 1967).

B. Proceedings in the Federal Courts

Appellant filed in the District Court on October 26, 1966 a petition in forma pauperis for a writ of habeas corpus (RT 1). On September 14, 1967, the petition was denied (RT 24, Exhibit B). On October 27 an order for rehearing was denied, and Judge Carter granted appellant's application for certificate of probable cause and for leave to appeal in forma pauperis (RT 49, Exhibit C). Appellant filed a notice of appeal to this Court on November 6 (RT 53). This Court also denied appellant's petition for mandamus (Misc. No. 3556) on October 3, 1967.

SUMMARY OF APPELLEES' ARGUMENT

The District Court did not abuse its discretion in declining to pass upon an issue not presented to the state courts.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS
DISCRETION IN DECLINING TO PASS UPON
AN ISSUE NOT PRESENTED TO THE STATE
COURTS.

In his petition for rehearing, appellant raised one new matter not presented in his original petition to the District Court or the Courts of California. He alleged that at the time of his arrest, he was suffering from severe withdrawal symptoms as a result of his narcotics addiction, and that he desperately desired more heroin. Because of this desperation, his offer to bribe the police was an involuntary act arising from his awareness that, once arrested, his supply of heroin would be terminated. The District Court declined to pass upon that issue because it had not been previously presented before the State courts (RT 51, Exhibit C); and appellant now contends that that refusal was an abuse of discretion.

Title 28, United States Code section 2254, requires as a condition precedent to federal habeas relief that a State prisoner exhaust the remedies available to him in the courts of the State or demonstrate that the remedies available are ineffective. A State prisoner

seeking post conviction relief in federal court is not entitled to urge contentions not made in the courts of the State. Hughes v. Wilson, 365 F.2d 596 (9th Cir. 1966). See also Boseant v. Fitzharris, 370 F.2d 105 (9th Cir. 1966); and Application of Atchley, 169 F.Supp. 313 (N.D. Cal. 1958). The court noted in Rose v. Dickson, 327 F.2d 27, 28-29 (9th Cir. 1964), that this requirement is predicated upon regard for the sovereignty of the State, consideration of practical efficiency and the realization that the State can grant relief on many bases not available to a federal court.

In Schiers v. People of the State of California, 333 F.2d 173, 175-176 (9th Cir. 1964), where an issue had been presented to the state courts, but the petitioner asserted specific facts relating to that issue for the first time on federal habeas corpus, the court said:

"These facts, if proved, present the constitutional issues of fair trial and due process in a wholly different light from that in which they were presented to the state courts.

"In our judgment the state courts should first be given the opportunity to pass upon these issues in their present form. Accordingly we hold, as to this contention, that

state remedies have not been exhausted."

Similarly, in Thomaston v. Gladden, 369 F.2d 693 (9th Cir. 1966), it was held that since an appellant's new contention was not the substantial equivalent of any which he had theretofore presented to the State court, but presented a materially different problem, he was required to submit it to the State court if the State court would hear it. It was held there that it was proper for the District Court to stay further proceedings in habeas corpus to permit appellant to present the issue to the State court. See also Bowie v. Wilson, 373 F.2d 514 (9th Cir. 1967). Such procedure is, of course, not mandatory and appellant was not prejudiced by the District Court's denial of habeas corpus on this issue. The denial is not on the merits and appellant may again bring the issue in the federal courts after he has exhausted his state remedies.

CONCLUSION

The District Court considered and ruled upon points 1, 2, 3, 5 and 6 raised by appellant in his opening brief in its order denying the petition for writ of habeas corpus (EXHIBIT B), and points 2, 4, 5, 7, 8, 9 and 10 in its order denying a rehearing (EXHIBIT C). With respect to those issues, appellant's opening brief on appeal presents no additional authority or reasoning which requires further discussion here.

It is respectfully submitted that the order of the District Court denying the petition for writ of habeas corpus should be affirmed.

DATED: February 23, 1968

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
Deputy Attorney General

A handwritten signature in cursive script, reading "Joyce F. Nedde".

JOYCE F. NEDDE
Deputy Attorney General

Attorneys for Appellees

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: February 23, 1968

JOYCE F. NEDDE
Deputy Attorney General
of the State of California

A P P E N D I X

STAY PENDING
Appeal
R.M. 5-19-60

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

MINUTES

Department No. 107

July 9 1959 Present Hon. CLEMENT D NYE Judge

THE PEOPLE OF THE STATE OF CALIFORNIA, vs
JOSEPH GUILLORY 209129

Deputy District Attorney J Busch and Defendant with counsel, H Weiss
by D Busby, present. Prior is found to be true. Probation denied.
Defendant is sentenced as indicated. Notice of Appeal is filed.
Stay of execution is granted pending Appeal. No bail on appeal.

J. Busby,

Whereas the said defendant having been duly found
guilty in this court of the crime of
BRIBERY (Sec 67 PC), a felony, as charged
in the information and prior conviction having been found true as
alleged, to wit: Sale of Narcotics, a felony, District Court of the
United States, Northern District of California, November 5, 1955
and served a term in the Federal Prison

C. I. M.
1960 MAY 25 PM 2:18
G.C. ADMITTANCE

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the State Prison for the term prescribed by law.

It is further Ordered that the defendant be remanded into the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Director of Corrections at the California State Prison at Chino.

This Minute Order has been

entered on JUL 14 59

HAROLD J. OSTLY, County Clerk and Clerk of
the Superior Court of the State of California, in
and for the County of Los Angeles.

By M. L. Williams Deputy

Prob. Aud. DMV
LAPD Csh. CYA
CO. J. Juv. C Clk.
Sher. Psyc. Misc.

MINUTES - State Prison

THE WITHIN INSTRUMENT IS
CORRECT COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE.
ATTEST:

CALIFORNIA STATE PRISON
AT SAN QUENTIN
BY [Signature]
RECORDS OFFICER

(AFFIX SEAL)

FILED

SEP 14 1967

JAMES P. WELSH, Clerk

2

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT.
OF CALIFORNIA

JOSEPH GUILLORY,

Petitioner,

v.

LAWRENCE E. WILSON, Warden,
et al.,

Respondents.

No.

ORDER DENYING PETITION
FOR WRIT OF HABEAS CORPUS

47842

Upon reading the affidavit of Joseph Guillory in forma pauperis it is hereby ORDERED that petitioner be allowed to file his petition for writ of habeas corpus without prepayment of fees.

Petitioner is seeking a writ of habeas corpus. He is presently incarcerated in San Quentin pursuant to a conviction for violation of California Penal Code § 67, bribery. Petitioner was represented by counsel at all stages of the proceedings and entered a plea of not guilty. He attacks the validity of his conviction on numerous grounds.

Petitioner alleges that certain evidence that was a product of an illegal search and seizure was improperly used at his trial against him. Mapp v. Ohio, 367 U.S. 643 (1961) established the rule that it is unconstitutional for evidence that is the product of an illegal search and seizure to be used in a state court as evidence against a defendant. However,

1 in Linkletter v. Walker, 381 U.S. 618 (1965) the United
2 States Supreme Court declined to give the rule established in
3 the Mapp case, supra, retroactive application. Thus since
4 petitioner's conviction was final before the date of Mapp v.
5 Ohio, supra, it is not subject to attack because of the use
6 of evidence gained from an illegal search and seizure.

7 Petitioner argues that the bribery statute under which
8 he was convicted is unconstitutionally vague. The constitutional
9 requirement of definiteness is violated only by a criminal
10 statute that fails to give a person of ordinary intelligence
11 fair notice that his contemplated conduct is forbidden by
12 the statute. Bouie v. City of Columbia, 378 U.S. 347 (1964).
13 The bribery statute under which petitioner was convicted
14 complies with this standard.

15 Petitioner alleges that he was denied a speedy trial.
16 However, he fails to allege that he previously raised any
17 objection to any delay, and he fails to allege that he was
18 prejudiced in any way. Thus the allegation is entirely
19 conclusory and without substance.

20 Petitioner alleges that his right to be protected from
21 self incrimination was violated. Petitioner argues that
22 because he was illegally arrested after forcible entry of his
23 premises by the arresting officers, the bribe offer to police
24 following this incident was coerced. This is not a logical
25 proposition, and petitioner alleges no additional facts to
26 support it.

27 Petitioner alleges that he was not given adequate
28 representation by counsel at his trial. One fact alleged in
29 this regard is that his lawyer failed to deal with petitioner's
30 inability to hear the trial proceedings due to a hearing
31 problem he was having. He alleges that his lawyer failed to
32 adequately inform the judge of the problem and that he failed

1 to take adequate steps to correct the situation.

2 However, petitioner admits that his lawyer brought the
3 problem to the attention of the court at the beginning of the
4 trial and saw to it that petitioner was seated near the witness
5 box to be better able to hear the testimony. Petitioner argues
6 that his counsel failed to postpone the trial proceedings
7 until he could get a battery for his hearing aid and failed
8 to check periodically on whether petitioner was in fact able
9 to hear from his new position in the courtroom.

10 Petitioner also alleges that his counsel failed to
11 object to the introduction of certain hearsay evidence and
12 to the delay in the bringing of the bribery charges.

13 None of these allegations if true would indicate an
14 inadequacy of counsel of constitutional proportions. Petitioner
15 does not allege facts which would indicate that his counsel
16 failed to render reasonably effective assistance and that
17 upon the whole course of the proceedings there was a denial
18 of fundamental fairness. Brubaker v. Dickson, 310 F.2d 30
19 (9th Cir. 1962).

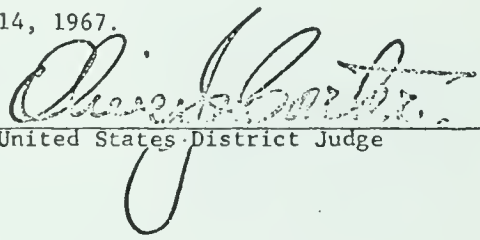
20 Petitioner argues that he was denied a fair trial under
21 his constitutional right to due process because the trial court
22 failed to protect his right to hear the proceedings, and failed
23 to ascertain that petitioner was able to hear the proceedings.
24 Petitioner implies, without specifically alleging, that he was
25 not able to hear some of what was being said at his trial.

26 This issue was raised on appeal before the District
27 Court of Appeal of California. People v. Guillory, 178 C.A.2d
28 854, 3 Cal. Rptr. 415 (1960). That court carefully reviewed
29 the entire record of the trial proceedings and determined that
30 petitioner " ... had a fair and considerate trial." People v.
31 Guillory, supra, 178 C.A.2d at 862. Before relief can be
32 granted on a writ of habeas corpus, this Court would have to

1 find that the trial judge in dealing with petitioner's inability
2 to hear the proceedings abused his discretion and acted in an
3 arbitrary and capricious manner. See 21 Am. Jur. 2d, Criminal
4 Law, § 338 (1965). In view of the finding of the District Court
5 of Appeal of California that the trial judge did not abuse
6 his discretion and did not act arbitrarily and capriciously,
7 and in view of the failure of petitioner to allege any extra-
8 ordinary matters not considered by that court, this Court is
9 not required to provide a forum for further, repetitious legal
10 proceedings, and declines to do so. 28 USC § 2254(d).

11 Accordingly, it is hereby ORDERED that this writ of
12 habeas corpus must be, and is hereby denied.

13 Dated: September 14, 1967.

14 
15 _____
16 United States District Judge
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

FILED

OCT 27 1967

JAMES P. WELSH, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT
OF CALIFORNIA

JOSEPH GUILLORY,

Petitioner,

v.

LAWRENCE E. WILSON, Warden,
LOUIS S. NELSON, Warden; STATE
OF CALIFORNIA, et al.,

Respondents.

No. 47842

ORDER SUBSTITUTING
RESPONDENT; ORDER DENYING
REHEARING; AND ORDER
GRANTING CERTIFICATE OF
PROBABLE CAUSE AND PER-
MISSION TO APPEAL IN
FORMA PAUPERIS

This case is before the Court on a motion for a rehearing and in the alternative a petition for certificate of probable cause for appeal in forma pauperis, and a motion for substitution of the respondent.

Upon motion of the petitioner and under Rule 25d, F.R.C.P., IT IS ORDERED that Louis S. Nelson be substituted as respondent in this action.

Petitioner, in his motion for rehearing, argues that he was convicted under a law, California Penal Code § 67 (offering a bribe to an executive officer of the State of California), which is unconstitutional as a bill of attainder. There is nothing in § 67 which restricts its operation to named individuals or a named group. Accordingly this attack is without merit. United States v. Brown, 381 U.S.

437 (1965).

*Copies made
to A.G. & B. L. L.*

7-1404

U. S. GOVERNMENT PRINTING OFFICE

10-207-67

27c

49

1 Contrary to petitioner's claim that California Penal
2 Code § 67 does not apply to people who are not an officer of
3 the State of California, this section applies to "Every person
4 who gives or offers any bribe ..." (Emphasis added).

5 Petitioner in raising search and seizure claims
6 argues that his conviction "may not" have been "final" before
7 Mapp v. Ohio, 367 U.S. 643 (1961) within the definition of
8 Linkletter v. Walker, 381 U.S. 618 (1965), (see fn. 5).

9 From the original petition in this case it is learned that
10 petitioner had one appeal from his conviction before the
11 District Court of Appeal of California, and its decision
12 affirming conviction was announced on March 16, 1960. People
13 v. Guillory, 178 C.A.2d 854, 3 Cal. Rptr. 415 (1960). There
14 is no indication either in petitioner's petition or in the
15 official reporter that further review was sought. Accordingly
16 petitioner's conviction became final under the Linkletter
17 finality rule when the time within which the Supreme Court of
18 California could grant a hearing expired, or sixty days after
19 the filing of the decision by the District Court of Appeal.
20 Rule 28a, Calif. App. R. of Ct.; Witkin, Calif. Crim. Proc.,
21 § 733 (1963). Thus petitioner's conviction was final well
22 before the Mapp case, supra, was decided.

23 Petitioner next claims that a statute such as
24 California Penal Code § 67 is unconstitutional under the
25 first amendment protection of speech because one of its
26 necessary elements comes from the spoken words in a bribe
27 offer. The first amendment does not protect all speech.
28 See Cox v. Louisiana, 379 U.S. 536, 555 (1965). The words
29 offering a bribe are not protected speech.

30 Petitioner suggests that this Court misinterpreted
31 his allegations that he did not hear the proceedings at his
32

1 trial and that therefore he could not effectively exercise
2 his right to confront witnesses against him. This Court's
3 previous order dealt with this contention at length, and
4 the reasoning and holding there are sufficient to cover
5 even an allegation that he heard nothing at all.

6 Petitioner is concerned that the undersigned judge
7 is prejudiced against him outside the merits of his petition
8 for writ of habeas corpus. His only basis for this feeling
9 is the fact that his petition was ruled on by this Court while
10 he had a petition for a writ of mandamus before the Court of
11 Appeals for the Ninth Circuit. One of petitioner's suggestions
12 for curing this prejudice is for this Court to grant a
13 certificate of probable cause so he can appeal this Court's
14 order in forma pauperis. Since this Court is inclined to
15 grant this for other reasons, no further disposition of the
16 matter is needed.


17 Petitioner raises one new matter not presented in the
18 first petition to this Court or to the courts of California.
19 He alleges that at the time of his arrest he was suffering
20 from severe withdrawal symptoms as a result of his narcotics
21 addiction, and that he desperately desired more heroin, and
22 that because of this desperation his offer to bribe the
23 police was an involuntary act arising from his awareness that
24 once arrested his supply of heroin would be terminated. Since
25 this issue has not been previously presented before the state
26 courts by petitioner, it will not be passed upon by this
27 Court. 28 USC § 2254(b).

28 Accordingly, IT IS ORDERED that petitioner's motion
29 for a rehearing be, and the same is hereby denied.

30 In view of this Court's opinion that this petition
31 is not entirely frivolous, IT IS ORDERED that a certificate
32 of probable cause for appeal is hereby granted.

1 Upon reading the affidavit of Joseph Guillory, in
2 forma pauperis, IT IS ORDERED that said petitioner be, and he
3 is hereby allowed to appeal in forma pauperis to the Court
4 of Appeals for the Ninth Circuit without the prepayment
5 of fees and costs, or security therefor, from the order of
6 this Court dated September 14, 1967, denying his petition
7 for a writ of habeas corpus, and the order today denying
8 a rehearing. "

9 Dated: October 27, 1967.

10
11 
12 United States District Judge
13 